Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

NO. 79-6219

SIGNA NELSON, Appellant,

v.

STATE ACCIDENT INSURANCE FUND, Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF OREGON

BRIEF OPPOSING MOTION TO DISMISS

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ATTORNEYS FOR APPELLANT

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Appellee concedes that Ms. Nelson will prevail if she can show that she was in fact incompetent at the time she allegedly received the denial notice. (Appellee's Motion to Dismiss, p. 3).

Review of the orders of the Workers' Compensation Board by the Oregon Court of Appeals is de novo. ORS 656.298(b). Coday v. Willamette Tug & Barge Co., 250 Or 39, 440 P2d 224 (1968); McManus v. State Accident Insurance Fund, 3 Or App 373, 474 P2d 31 (1970).

The issue before the Court of Appeals was stated by the Court:

> "The issue presented is whether claimant's mental incapacity at the time of the denial excuses her failure to request a hearing on the denial within the time limits established by ORS 656.319(1)." 43 Or App at 157. (emphasis added)

The precise holding of the Court of Appeals was:

> "We hold that claimant's mental incapacity at the time of the denial did not excuse her compliance with ORS 656.319(1)." 43 Or App at 160 (emphasis added)

Thus, the Court of Appeals found as a fact that Ms. Nelson was mentally incapacitated at the time Appellee claims she received notice. Indeed, all the previous fact finders came to the same conclusion. (See Opinion of Workers' Compensation Board, Appendix 9a; Opinion of Referee, Appendix 13a, attached hereto).

Appellee's attempts to find contrary inferences in the record are therefore foreclosed and are red herrings. Further, Appellee's attempt to categorize Ms. Nelson's daughter as a guardian of her mother is unavailing. The daughter testified that she "didn't understand any of it" -- referring to the letter. Secondly, as a matter of due process citizens are entitled to personal notice, unless a legal guardian exists. The daughter was a daughter, not a legal guardian. Here, Appellee had notice of Ms. Nelson's incapacity no later than April 6 -- three weeks before she entered the mental hospital and nine weeks before Appellee sent her notice of denial.

CONCLUSION

Probable jurisdiction should be noted. Indeed, per curiam reversal is warranted.

Dated: May 9, 1980

Respectfully submitted,

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BEFORE THE WORKERS' COMPENSATION BOARD OF

THE STATE OF OREGON

In the Matter of the Compensation of SIGNA NELSON, Claimant [Request for Review by the SAIF]	WCB Case No. 77-1153 SAIF Claim No. DC 434390 ORDER ON REVIEW

Reviewed by Board Members Wilson and Phillips.

The State Accident Insurance Fund seeks review by the Board of the Referee's order setting aside its denial dated May 24, 1974 of claimant's psychological problems and remanding the claim to the Fund for acceptance and payment of compensation, as provided by law.

At the hearing before the Referee, four issues were presented: (1) extent of disability; (2) propriety of the Fund's denial of responsibility for claimant's psychological problems; (3) propriety of the Fund's refusal to reopen the claim as of March 10, 1977; and (4) whether or not claimant was presently orthopedically and psychologically stationary.

Claimant had suffered a compensable injury to her back in December 1972 and was receiving compensation for that injury at the time she was admitted to the Oregon State Hospital as a patient on April 25, 1973. Claimant remained as a patient there until September 11, 1973 when she was discharged and considered improved, competent, and able to drive a motor vehicle. Claimant's illness was diagnosed as involutional melancholia, in remission. She had been tried on various psychotrophic medications since her admission, but when she failed to respond she was given a course in electroconvulsive therapy in June 1973 to alleviate the depression; this was only moderately successful.

Upon claimant's discharge, it was recommended that she contact the Multnomah County Mental Health Clinic for a follow-up and further prescriptions. The prognosis was fair if in the near future she could get a meaningful full time job, but the doctor indicated that if this did not happen it was quite possible claimant would become depressed again and might require rehospitalization.

Claimant's claim was first closed by a Determination Order in July 1973 which awarded her 16° for 5% permanent partial disability. On December 27, 1973 the claim was reopened for treatment and on February 15, 1974 a laminectomy was performed at L4-5.

Claimant was referred to the Pain Clinic in Portland on June 5, 1974 and her claim was subsequently closed by a Second Determination Order dated June 23, 1974 which awarded claimant additional compensation for 20% permanent partial disability but nothing for the psychological problems which had been denied on May 24, 1973.

Claimant requested a hearing on November 19, 1974 and raised all of the issues referred to previously. Pursuant to a stipulation, dated April 29, 1975, the claim was reopened. A Third Determination Order, dated July 21, 1975, awarded claimant no additional compensation for permanent partial disability. Again a request for hearing was made and again the claim was reopened for further treatment prior to the hearing. The claim was then closed by a Fourth Determination Order, dated February 1, 1977, which awarded claimant additional compensation for temporary total disability and additional 32° for 10% permanent partial disability.

On February 7, 1977 another request for hearing was made and on June 10, 1977 all parties were present for that hearing which was actually treated as a conference and the issue of the competency of claimant at the time she received the letter denying responsibility for her psychological problems was delineated. On August 15, 1977 there was a request for reopening and another request for hearing.

The Fund's position was that the Referee had no jurisdiction to entertain the motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

Dr. Moss, a psychiatrist, testified that claimant's industrial trauma when she fell down some stairs was a significant triggering effect in precipitating claimant's depression and that she had never re-established herself to the psychological state which she had been prior to the industrial injury.

Dr. Moss interviewed claimant to determine if she understood the denial made by the Fund. He read the hospital records relating to the electrical shock treatment to establish the proximity of time to the date she received the denial letter and he also checked her memory and comprehension at that time. He felt she had some knowledge of the denial matter but that her memory changed from day to day and she could not keep it in focus.

It was Dr. Moss' opinion that claimant's memory confusion probably cleared somewhat after September, however, it was not a complete recovery. Claimant told Dr. Moss she continued to have back problems which affected her emotionally and from 1973 to 1976 she had been receiving out-patient mental clinic care. Dr. Moss, who had previously worked at the Oregon State Hospital, said it was standard procedure no matter what condition the patient was in to report that he or she was considered improved, competent, and able to drive a motor vehicle at the time said patient was discharged.

The Referee found that claimant did not have the competency to understand the letter of denial to the extent that she would have been able to make a timely request for hearing when she received the letter while a patient in the Oregon State Hospital. Although several months later she was able to perform day to day tasks, she still did not have the emotional and mental level to request a hearing on the issue until it was actually done on her behalf by an attorney. He found that all the medical evidence indicated that claimant still has not returned to her pre-accident mental status and that she has had on-going mental problems and has a serious problem even at the present time. He set aside the denial by the Fund for responsibility for claimant's psychological problems dated May 24, 1973. This rendered moot all of the other issues.

The Board, on de novo review, finds that Dr. Moss' testimony is sufficient to establish that claimant's psychological problems were related to her industrial injury in December 1972 and, therefore, the denial of responsibility therefor by the Fund was improper. The Board agrees with the Referee that claimant was not mentally competent at the time she received the Fund's denial dated May 24, 1973 to fully realize what was required to make a timely request for hearing on said denial. The Referee properly set aside the denial and by doing so rendered moot all of the other issues presented at the hearing.

ORDER

The order of the Referee, dated June 21, 1978, is affirmed.

Claimant's attorney is awarded as a reasonable attorney's fee for his services at Board review the sum of $350, payable by the State Accident Insurance Fund.

NOTICE TO ALL PARTIES: This order is final unless within 30 days after the date of mailing of copies of this order to the parties, one of the parties appeals to the Court of Appeals for judicial review as provided by ORS 656.298.

Entered at Salem, Oregon and copies mailed to:

Signa Nelson, 1509 Jackson St., Oregon City, OR 97045
Merten & Saltveit, Attorneys, 117 SW Taylor St., Portland, OR 97204
City Center Motel, 250 First Ave., Seaside, OR 97128
State Accident Insurance Fund, Claims Div., Salem, OR 97312
SAIF, Legal Services, 400 SE High, Salem, OR 97312

on this 15th day of May, 1979

WORKERS' COMPENSATION BOARD

M. Keith Wilson, Chairman

Approved as to form:

John R. McCullough
Appeals Counsel

Kenneth V. Phillips, Board Member

BEFORE THE WORKERS' COMPENSATION BOARD

STATE OF OREGON

HEARINGS DIVISION

In the Matter of the Compensation of SIGNA NELSON, Claimant	)	WCB Case No. 77-1153 SAIF Claim No. DC 434390 OPINION AND ORDER

This matter came on regularly for hearing the 25th day January, 1978, in Portland, before Joseph D. St. Martin, Administrative Law Judge. Claimant was present and represented by Peter Davis and the State Accident Insurance Fund appeared by and through Ken Kleinsmith. The case was continued for closing arguments and claimant's brief was received March 31, 1978. SAIF's counsel telephoned the undersigned that SAIF would not submit a closing argument, but the telephone message was inadvertently mislaid, and the case was closed April 26, 1978 upon request of claimant's counsel.

The prime issue is whether SAIF's denial of May 24, 1973 should be set aside. The denial was for responsibility for psychological problems and was sent to her last known home address. During the interim, claimant was admitted on April 25, 1973 to the Oregon State Hospital where she was a patient until September 11, 1973. She was discharged as considered improved, competent and able to drive a motor vehicle. The diagnosis was involutional melancholia, in remission. She was receiving compensation from her December, 1972 industrial accident to her back while she was in the hospital. Claimant was tried on various psychotrophic medications since April, 1973, but when she failed to respond she was given a course of electroconvulsive therapy in June, 1973 to alleviate the depression which was only moderately successful. She continued to be on an anti-depressant medication and on discharge it was recommended that she contact the Multnomah County Mental Health Clinic for follow-up and further prescriptions. Prognosis was fair if in the near future she could get a meaningful full-time job. The doctor indicated that if this did not happen there was a good chance that claimant would become depressed again and might need to be rehospitalized. Prognosis from that standpoint remained somewhat guarded. The doctor's prognosis was very acurate because she has had to be rehospitalized.

In July of 1973, a First Determination Order was issued awarding 5% permanent partial disability. On December 27, 1973, the claim was re-opened for treatment and on February 15, 1974 a laminectomy was performed at L4-5. On June 5, 1974, she was referred to the Portland Pain Clinic. A Second Determination Order of June 23, 1974 awarded claimant an additional 20% permanent partial disability and nothing for the denied condition. Claimant first requested a hearing on November 19, 1974, raising all issues. On April 29, 1975, a Stipulation was entered into re-opening her claim and on July 21, 1975 a Third Determination Order was issued awarding no additional permanent partial disability. There was a request for hearing and then on January 1, 1976 the claim was again re-opened for further treatment. On February 1, 1977, a Fourth Determination Order awarded additional time loss and an additional 10% permanent partial disability. On February 7, 1977, there was a request for hearing and on June 10, 1977 all parties were present for a hearing that was treated as a conference and the issue of the competency of claimant when she received the denial letter for psychological problems was delineated. On August 15, 1977, there was a request for re-opening and another request for hearing.

The Fund's position is that the Administrative Law Judge has no jurisdiction to entertain the Motion to set aside the denial because at some time the denial was brought to her attorney and she thereafter became competent so that she was now bound thereby.

At the hearing, a well qualified psychiatrist, Dr. Roy Moss, testified that her industrial trauma when she fell down some stairs was the significant triggering effect in precipitating her depression and that she has never re-established herself to the psychological state she had before the industrial accident.

Dr. Moss testified that he interviewed claimant a second time to ascertain if she understood the SAIF denial. He read the hospital records of the dates of the electroshock treatment to establish the proximity of time to receiving the denial and he prepared himself for checking her memory and comprehension at that time. He thought she had some knowledge of the denial matter, but her memory changed from day to day and she could not keep it in focus. He thought that her memory confusion probably cleared in 2-3 months and that perhaps after September over a period of 2-5 months she became more clear in her mind, but it was not a complete recovery. By history she continued to have back problems which affected her emotionally and from 1973 to 1976 she had out-patient mental clinic care. She told the doctor in October of 1973 she could handle everyday things, but he thought that she was passive,

that even though she understood the matter that she would be a person most reluctant to take steps on her own. Her passivity and depression may have made her feel hopeless to pursue any denial matter. She thought the denial matter was foreclosed to her and that's why she never tried to relitigate it.

On cross-examination, Dr. Moss testified that she had a passive-dependent personality before the accident, but she compensated for it and was able to function. He stated that he used to work at the State hospital and it was standard to say no matter what state the patient was in, that he or she is now considered improved, competent and able to drive a motor vehicle. On redirect, he stated claimant was significantly impaired irrespective of money factors involved in the compensation claim.

OPINION:

I am of the opinion that claimant did not have the competency to understand the denial to timely request a hearing when she received it while in the State mental hospital and that while several months later she was able to perform day to day tasks she did not have the emotional and mental level to request a hearing on the issue thereafter until it was done on her behalf by counsel. All of the medical testimony, and there is none to the contrary, points out that she still has not returned to her pre-accident mental status and that she has had ongoing mental problems and has a serious problem even yet today. Her mental condition for this entire period of time has been very carefully reviewed by Dr. Moss and I am well satisfied with his honest, credible testimony about claimant's mental health condition. The setting aside of this denial renders the other issues moot.

ORDER:

IT IS HEREBY ORDERED that the SAIF denial of May 24, 1973 be and the same is hereby set aside; and

IT IS FURTHER ORDERED that the claim for psychological problems precipitated by the industrial accident be and the same is hereby remanded to SAIF for acceptance and payment of benefits as by law provided; and

IT IS FURTHER ORDERED that Peter Davis be and he is hereby awarded a reasonable attorney fee of $1,000 for prevailing upon a denied claim payable by SAIF.

CERTIFICATE OF SERVICE

I hereby certify that I served the foregoing BRIEF OPPOSING MOTION TO DISMISS on Darrell E. Bewley, attorney for Appellee, on the 9th day of May, 1980, by mailing to said attorney three correct copies thereof, certified by me as such, contained in a sealed envelope, with postage paid, addressed to the said attorney at his regular office address, to wit:

Darrell E. Bewley
State Accident Insurance Fund
SAIF Building
400 High Street, S. E.
Salem, Oregon 97312

and deposited in the post office at Portland, Oregon, on said day. Between the said post office and the address to which said copies were mailed, there is a regular communication by U. S. Mail.

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